SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 824

JOSEPH H. BARWISE AND GEORGE THOMPSON, JR., AS TRUSTEES OF THE ESTATE OF MRS. M. M. (W. I.) COOK, DECEASED, APPELLANTS,

vs.

GEORGE H. SHEPPARD, AS COMPTROLLER OF THE STATE OF TEXAS, ET AL.

APPEAL FROM THE COURT OF CIVIL APPEALS, THIRD SUPREME JUDICIAL DISTRICT, STATE OF TEXAS

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[fol. 1]

IN DISTRICT COURT FOR THE 53rd JUDICIAL DISTRICT, TRAVIS COUNTY, TEXAS

No. 54,822

TRUSTEES OF MRS. M. M. (W. I.) COOK ESTATE,

vs.

GEORGE H. SHEPPARD, as Comptroller of the State of Texas, et al.

PLAINTIFFS' ORIGINAL PETITION—Filed Dec. 14, 1934

To said Honorable Court:

Come now Joseph H. Barwise, and George Thompson, Jr., as Trustees of the estate of Mrs. M. M. (W. I.) Cook, deceased, hereinafter designated plaintiffs, complaining of George H. Sheppard as Comptroller of Public Accounts of the State of Texas, and Charley Lockhart as State Treasurer of the State of Texas, hereinafter designated defendants, and for cause of action against said defendants, allege and would show to the Court as follows, to-wit:

I

(a) The plaintiffs are residents of Tarrant County, Texas.

(b) The defendants are residents of Travis County, Texas.

(c) The plaintiffs are the Trustees duly appointed, qualified and acting, under the will of Mrs. M. M. (W. I.) Cook, who died on or about February 22, 1932, and whose will was duly probated by an order of the County Court of Shackelford County, Texas, about April 5, 1932.

(d) The plaintiffs, under and by virtue of the terms and provisions of said will, became invested with and are the owners in fee simple of the lands, mineral rights and oil royalty interests therein, hereinafter described.

[fol. 2] (e) The defendant George H. Sheppard is the duly elected, qualified and acting Comptroller of Public

Accounts of the State of Texas; the defendant Charley Lockhart is the duly qualified and acting Treasurer of the State of Texas.

II

(a) Heretofore on or about the 11th day of May, 1925, Mrs. M. M. Cook, a widow, individually, and as independent executrix of the estate of W. I. Cook, her deceased husband, being the owner of the oil and gas in place under said land, made, executed and delivered to Roeser & Pendleton, Inc., two certain oil and gas leases covering, among other lands, Sections Nos. 60, 61, 62, 83, 84, 85 and 88, E. T. Ry. Co. Land in Shackelford County, Texas, being a part of what is generally known as the Cook ranch, by the terms of which the said Roeser & Pendleton, Inc., (lessee) acquired the right, exclusive of everyone, (including the lessor) to go upon, explore and develop said land for oil and gas, and by operations conducted thereon to produce and save oil and gas from said land, and, in consideration thereof contracted and agreed with lessor to deliver to the credit of lessor, (the said Mrs. M. M. Cook, her heirs or representatives) free of cost in the pipeline to which it might connect its wells, the equal 1/8th part of all oil produced and saved from the leased premises, as royalty oil.

(b) Since the execution of said leases there has been produced, from said land, approximately 11,000,000 barrels of oil, and there is now being produced therefrom approximately 2,000 barrels of oil per day.

(c) Plaintiffs, as trustees of the estate of Mrs. M. M. Cook, own one-half of the 1/8th oil royalty and royalty interest, under said land, in fee simple, and with respect to a small strip off the East side of sections 60, 61, 62 and the South side of sections 60, 85 and 88, a slightly larger proportion of the 1/8th royalty interest, as provided for in said leases. Plaintiffs believe and here so allege, that [fol. 3] there are yet in excess of 800,000 barrels of recoverable oil under said leased premises, of which more than 50,000 barrels, when produced and saved by the operating lessee, will belong to plaintiffs, as owners of the approximately 1/2 of the 1/8 Royalty interest, and they allege that the reasonable value of 2% of their interest in the oil royalty reserved, under said leases, is in excess of $1,000.00, and the one-half oil royalty interest owned by them there-

under (the title to which has been clouded as hereinafter set out) is reasonably worth in excess of $20,000.00.

III

(a) At the time of the execution of said leases, as aforesaid, producers and operators of oil properties in Texas, who are designated lessees, were required, by the then existing laws of Texas, to pay, from their share of the production of oil in the State of Texas, an occupation or privilege tax measured by a stated per centum of the total oil produced, including royalty oil.

(b) On the 22nd of May, 1933, there was approved by the Governor of the State of Texas, an Act of the Legislature of Texas, known as House Bill 154, Chapter 162, Acts 43rd Legislature, Regular Session (page 409) effective August 29, 1933, entitled:

"An Act to raise revenue for the support of the State Government by imposing and providing a tax upon the production of all oil within this State; * * * defining certain words, terms, and phrases for the purpose of this Act; providing the purchaser of oil shall pay the tax on oil purchased and deduct the tax so paid from the payment due the producer; providing the manner and method of remitting said tax to the Comptroller of Public Accounts and State Treasurer and requiring the tax to be paid on all oil that is not sold by the producer; providing for monthly payments of said tax and prescribing the date upon which tax shall be paid and by whom it shall be paid; providing that if said tax is withheld by the purchaser and said purchaser fails to make payment of said tax to the State that the producer may have legal action against the purchaser by reason of such failure, and providing for at- [fol. 4] torney's fees; providing for maintaining certain records; providing penalties for the failure to pay the tax imposed upon the production of oil and six per cent interest on delinquant penalties and interest; requiring the tax to be borne ratably by all interested parties; allocating the taxes received from all sources as herein imposed, * * * one-half to the Public School Fund and one-half to the credit of the General Revenue Fund, * * * requiring purchasers who buy oil from properties in litigation or covered by assignments to deduct amount of taxes before payment for said oil and to remit said tax deducted

in the same manner as provided for oil purchasers from other sources; requiring producers and purchasers to file certain reports with the Comptroller monthly and to submit said report with the amount of taxes due; providing that all taxes, penalties, and interest shall be secured by a first superior and preferred lien on the property of the producer, which shall include all leasehold interest and oil produced and all other property used in connection with the production of such oil; providing for the filing of suits by the Attorney General for the recovery of any taxes due or past due and providing for the venue for said suits in Travis County, Texas; providing that it shall be a misdemeanor for any person, firm, or corporation to violate any of the provisions of this Act and prescribing certain penalties as punishment for the violation of same by any producer, purchaser, * * * and the amount of expenses set out in said Act for the enforcement or administration be deducted from the gross amount collected monthly; * * * making it unlawful for any person owning, leasing, operating, or controlling any oil property to permit oil or gas to pass beyond his possession or control without first accurately measuring the amount of oil or gas and making and preserving an accurate record thereof and prescribing penalties for the violation thereof upon conviction; * * * providing that if any provision, section, or sub-section of this Act shall be held or declared to be unconstitutional for any reason, such decision or holding of the court shall not impair or affect any remaining portion of this Act, and the same shall remain in full force and effect and it is the intention of this Legislature that the same shall remain in full force and effect; and declaring an emergency."

(c) By section 1 of said Act, a "producer" is defined as meaning any person or persons, corporation, partnership, individual, trustee, receiver, trust estate or administrator owning, controlling, managing or leasing any oil well or any person who produces in any manner any oil by taking it from the earth or waters in the State. "Production of total oil produced" is defined as meaning 100% of [fol. 5] the oil produced in the State.

(* * * The omitted portions of the caption relate to taxes imposed on unrelated occupations.)

(d) By section 2 (1) of said Act there is levied an occupation tax, on oil produced within the State, of two cents (2¢) per barrel of 42 standard gallons. It is provided that said tax shall be computed upon the total oil produced, without deduction, and that the occupation tax levied shall be 2% of the market value of the oil whenever the market value exceeds $1.00 per barrel.

(e) By section 2 (2) it is provided that the tax levied shall be a liability of the producer; by section 2 (3) the purchaser of oil is required to pay the tax on all oil produced and to deduct the tax so paid from the payments due the "producer or other interest holder", such payments to be made to the Comptroller of Public Accounts by legal tender or cashier's check payable to the State Treasurer. It is provided, however, that if oil produced is not sold during the month produced then the producer shall pay the tax at the same rate and in the same manner as if the oil were sold.

(f) Section 2 (4) provides the time of payment of said tax, and section 2 (3) provides a penalty for delinquency of 10% of the amount of the tax and that the delinquent tax shall bear 6% interest per annum from due date until paid.

(g) Sevtion 2 (6) of said Act provides the tax therein levied shall be borne ratably by all interested parties, including royalty interest; and producers or purchasers of oil are thereby authorized and required to withhold, from any payments due interested parties, the proportionate tax due.

(h) Section 2 (7) directs the allocation of the tax by the Comptroller, ½ to the State Treasurer for the credit of the public school fund and ½ to the State Treasurer for the credit of the general fund of the State of Texas.

(i) Sections 3, 4, and 5 of said Act provide for the keeping of records, by producers and purchasers of oil, enable defendants to collect said tax from *difuciaries*, d pro-
[fol. 6] vide other administrative details relating to the collection and payment of the tax.

(j) Section 6 of said Act provides that, for the tax, penalty and interest, the State shall have a prior and preferred lien on any leasehold interest, ownership of oil rights, or interest, including oil produced and oil runs owned by the person owing such tax, and that such lien shall include

equipment, tools, tanks and all other implements used on the lease from which oil is produced.

(k) Section 9-B of said Act makes it a felony punishable by confinement in the penitentiary for from two to four years for any person owning, leasing, operating or controlling any oil property within the State of Texas to wilfully permit the oil or gas produced therefrom to pass beyond the possession or control of such person into the possession or control of such person into the possession or control of any other person without first accurately measuring the amount of such oil or such gas and making and preserving an accurate record thereof.

IV

The Act described in paragraph IV hereof, was amended at the first called session of the 43rd Legislature, 1933, (p. 43) by an Act entitled:

"An Act amending Sections 2, 3, 5 and 9 of Chapter 162, House Bill No. 154 Acts of the Forty-third Legislature, Regular Session, providing for monthly payment of tax levied and prescribing the date upon which tax shall be paid, by whom it shall be paid; providing that if said tax is withheld by the purchaser and said purchaser fails to make payment of said tax to the State that the producer may have legal action against the purchaser by reason of such failure, and providing for attorney's fee; providing penalties for the failure to pay the tax imposed upon the production of oil and six per cent (6%) interest on delinquent penalties and interest; providing the proceeds of said tax shall be deposited, one-half to the credit of the Public School Fund and one-half to the credit of the General Fund of the State of Texas; authorizing the Comptroller to promulgate rules and regulations for the enforcement of this Act and the amount of expenses set out in said Act for the enforcement or administration be deducted and appropriated from the gross amount collected, and providing for employees therein, prescribing maximum salaries, providing for equipment and supplies and other expenses necessary to enforce this Act, and declaring an emergency."

[fol. 7] This Amended Act, while re-enacting certain sections of the original law, in substance, changed the monthly

date for payment of the tax and the form of reports required thereby.

V

(a) Notwithstanding the fact that the plaintiffs are not producers, managers or operators of the oil property described herein, within the meaning of said Acts of the Legislature, and

(b) Notwithstanding the fact that, by the terms of the aforesaid leases, the lessee has the exclusive right to enter upon said land and explore, manage, develop and operate the same for oil and gas, and produce and save oil therefrom, being accountable to the plaintiffs for their aforesaid royalty oil; and

(c) Notwithstanding the fact that the plaintiffs are not engaged in an occupation or business in respect to the production of oil from said leases but are simply receiving and entitled to receive, under the terms of said leases, their royalty oil free of cost to them, in the pipeline to which the wells may be connected; and

(d) Notwithstanding the fact that while, the plaintiffs own an oil royalty interest, under said leases, they have no right or duty, under said leases to control the operation thereof or to produce oil from the lands covered thereby, or to take possession of and measure same, or any part thereof;

(1) Nevertheless, Plaintiff's allege: The defendant, the Comptroller of Public Accounts of the State of Texas, so plaintiffs are informed and believe, has notified the Humble Pipeline Company, the pipeline carrier of the oil produced from said leases, and the Humble Oil and Refining Company, the purchaser of the oil produced from said leases, and said lessee, that the part of said occupation tax imposed by said law, attributable to plaintiffs part of said [fol. 8] royalty oil, must be deducted from the amount due plaintiffs under said leases, and their contracts for the sale of said oil, and when so deducted, must be paid to said defendant, Comptroller of Public Accounts, pursuant to the provisions of said law, as amended, and that failure to pay the same will result in penalties being assessed against the plaintiffs, and as well the purchaser and transporter.

(2) Plaintiffs further allege, upon information and belief, that if said tax is paid out of plaintiff's money, said defendant, Comptroller of Public Accounts, upon receipt thereof, will turn the money over to the defendant State Treasurer for allocation as provided by said Act; and, unless such payments are made, in the manner aforesaid, the defendants, as required by said law, will cause suit to be instituted against plaintiffs, their lessees and the purchaser of their oil, to recover said tax, interest and penalties, and to foreclose the lien fixed by said Acts, upon plaintiffs oil royalty interest in said land.

(3) Plaintiffs further allege that since the enactment of said law the purchaser of said oil, Humble Oil and Refining Company, has deducted 2% of the value of plaintiffs oil, each month as and when produced by lessees, and has failed and refused, on account of said law, to pay plaintiffs 100% for their royalty oil, in accordance with plaintiff's contracts, and will continue to do so unless the relief prayed for herein is granted.

Plaintiffs would show to the Court that, as aforesaid, oil is being daily produced on the hereinbefore described lands in a large quantity, approximately (2,000 barrels per day), that the same is being daily sold and delivered; that the purchase price thereof is constantly accruing and becoming payable to the plaintiffs and under the provisions of said Act as amended, the purchaser or operator, as the case may be, is required to deduct from plaintiffs' royalty share of said oil and pay over to the Comptroller the two [fol. 9] cents per barrel or two per centum of the purchase price or value of said oil, to pay that part of the occupation tax of the lessee, who is exclusively operating the wells on plaintiffs' lands hereinbefore described.

(4) Plaintiffs further allege that the defendants, purporting to act under the terms of said Act, will continually and continuously during the pendency of this suit, unless restrained by order of this Court, attempt to interfere with and prevent the payment to the plaintiffs of the full 100% purchase price of their royalty oil, by having said tax deducted and paid over, as aforesaid.

(5) In this connection, the plaintiffs would show to the Court that long prior to the enactment of said law, they had a contract or contracts in writing with the above mentioned

pipeline carrier and purchaser of their royalty oil, produced from said land, by the terms of which the plaintiffs sold and agreed to deliver to the purchaser, through the instrumentality of said pipeline, the royalty oil belonging to them, produced from said leases premises, at and for the price posted from time to time by the purchasing for oil of like kind and quality, in the vicinity where the same was produced, and the purchaser agreed to pay the plaintiffs at stated times said posted price for such oil, without deduction, in compliance with said leases.

VI

Plaintiffs would show to the Court that said Acts of the Legislature, hereinbefore pleaded, violate the provisions of the Constitution of the United States and of the State of Texas in the following respects, to-wit:

(a) Said Acts violate the obligation of contract clauses of both the Federal and State Constitutions by appropriating, in violation of the lease contracts, aforesaid, between the plaintiffs and their lessees, a portion of the plaintiffs' royalty interest in said land perpetually, in the guise of collecting from plaintiffs a part of the occupation tax levied against the producer of said oil, the lessee, under said [fol. 10] leases.

(b) Said acts violate the obligation of contract clauses of both the Federal and State Constitutions by requiring the purchaser of said oil, or the producer as the case may be, in violation of the lease and oil purchase contracts, aforesaid, to pay over to the defendant State Comptroller, at least two per centum of the purchase price of said royalty oil, on account of the occupation tax levied against the occupation of the producers of said oil, the plaintiffs' lessees.

(c) Said Acts violate the due process of law clauses of both the Federal and State Constitutions by arbitrarily confiscating and appropriating perpetually as hereinbefore set forth, two per centum of the value of plaintiffs' oil Royalty interest in said lands, for the occupation tax liability of the producer of said oil.

(d) Said Acts of the Legislature are violative of the due process of law clauses of both the State and Federal Constitutions in arbitrarily and unreasonably requiring plain-

tiffs to bear at least two per centum of the occupation tax of another, to-wit: the producer, the plaintiffs are not being engaged in the business or occupation of producing oil.

(e) Said Acts are violative of the obligation of contract clauses of the State and Federal Constitution in creating and fixing a lien upon the plaintiffs royalty interest in said lands, for the entire tax, penalties and interest provided for in said acts, whereas, said leases imply, as aforesaid, that the plaintiffs' royalty interest shall be kept free of cost, charge or encumbrance on account of anything done by the producer in connection with the production of oil therefrom.

(f) Said Acts of the Legislature violate the due process of law clauses of both the State and Federal Constitutions in arbitrarily fixing a lien upon the plaintiffs' oil rights [fol. 11] under said leases and upon their oil produced therefrom or in transit, on account of the liability of the producer of said oil for said occupation tax, penalties and interest, thereby creating a cloud upon the plaintiffs' entire royalty interest in said leases on account of such unlawful and illegal provision.

(g) Said Act of May 22, 1933, is an original general Revenue measure. Theretofore an occupation tax had never been imposed upon royalty owners on account of the production of oil by the producer. The caption of said Act gives no notice, as is required by Article 3, Section 35, of the Texas Constitution, that a tax will be imposed by said Act directly or indirectly upon the owners of oil royalty or upon the property of oil royalty owners. The amendatory Act, aforesaid, is violative of said Constitutional provision for the same reason.

VII

The defendants have interpreted said Act of the Legislature as imposing an occupation tax upon producers of oil and as requiring the owners of royalty to pay a portion of such occupation tax, all as hereinbefore alleged, and in the light of such interpretation are applying the same against the plaintiffs and others similarly situated, unlawfully and in violation of plaintiffs' constitutional rights in each of the respects hereinbefore set forth.

VIII

In truth and in fact, notwithstanding the foregoing facts said Acts cannot be construed otherwise than as a tax upon the plaintiffs' oil royalty interest under said leases and lands as such, and same are violative of the Constitution of Texas in this:

(b) Plaintiffs allege that under the Constitution and laws of the State of Texas their interest in said property [fol. 12] is and constitutes realty, taxable as such, in and by the County where it is situated, and as other real property, solely according to its value, equally and uniformly with other property, at a rate not in excess of 35¢ on the $100.00 valuation and the Commissioners' Court of the several counties are the sole authorities authorized to fix such value.

(c) In this connection plaintiffs allege that they have duly paid and have been assessed by the tax assessor of Shackelford County, Texas, for State and County taxes on account of said oil royalty interest, in the manner provided by law.

(d) That no other real property in said County or in the State is assessed on an ad valorem basis, and at the same time upon a basis similar to that imposed upon it by the Acts in question, so that said Acts impose a double tax upon the plaintiffs property, in violation of (1) the equal and uniform tax clauses contained in Section 1, Article 8, of the Texas Constitution; (2) the 35¢ on the $100.00 valuation clause of Section 9, Article 8, of the Texas Constitution; (3) the provisions of the Constitution of Texas relating to the rendition and assessment of land in the County where situated, and (4) the provisions relating to the valuation thereof for tax purposes, by the Commissioners' Court.

IX

Heretofore on April 6, 1934, these plaintiffs sued the defendants and the Attorney General of Texas in the District Court of the United States for the Western District of Texas, at Austin in Cause No. 479 Equity, on the same grounds set forth herein but on motion of the defendant said cause was dismissed without decision, as, it was held,

the amount in controversy was not sufficient to give said Court jurisdiction. On that account however the defendant [fol. 13] Comptroller has been considering the money paid by the Humble Oil & Refining Company as gross production tax attributable to plaintiffs' interest aforesaid, as in litigation and has held the same in suspense and the same has not been commingled with other funds of the State. In this connection plaintiffs allege that unless restrained the defendants will unlawfully cause said money to be taken out of said suspense account and commingled with other funds of the State and therefore lost to the plaintiffs. The amount of money so in suspense in the hands of the defendants is to-wit: the sum of $1,000.00, but the exact amount thereof is peculiarly known to the defendant.

X

The plaintiffs have no plain, adequate and speedy remedy at law for the protection of their rights in the premises, because:

(1) The laws in question are new and have not been interpreted by our Courts.

(2) The taxes in question are not paid by the plaintiffs but are charged to them and paid by the purchaser of the oil or the producer as the sace may be, in the manner hereinbefore specified. Upon payment thereof into the hands of the defendants Comptroller and State Treasurer, there is no law authorizing the recovery of the same back and such monies pass into the general funds of the State, save that

(3) The only remedy at law, which plaintiffs allege is inadequate, is that provided by House Bill No. 11, Chapter 214, Acts 43rd Legislature, Regular Session (p. 637) which authorizes only such persons as are required by law to pay occupation, franchise, license or privilege taxes, to pay the same under protest, if they believe the tax is unlawful and such taxpayer has 90 days from date of payment to sue for the recovery of the tax paid, in the District Court of Travis County, and nowhere else.

[fol. 14] (4) Monies paid on such accounts under protest are to be held by the defendant State Treasurer in suspense and deposited at interest with other State funds and

the same are required when deposited, to earn interest in the depository, at the same rate as other State funds. Plaintiffs allege the amount of such earned interest is less than common interest of 6% and is wholly inadequate to recompense the plaintiffs for the loss of the use of said money during the suit period.

(5) The remedy, provided by said law, limits the recovery to the amount paid plus the earned interest.

(6) By virtue of said Act, also, protesting taxpayers are limited in their suit to the recovery of only such taxes as were paid under protest and to the grounds specified in the protest.

(7) There is no provision of State law for the impounding of monies paid on account of said tax after the institution of said suit so that successive monthly protests and actions under said law would be necessary to protect the rights of the protesting taxpayer during the period the law was being tested.

(8) It is certain that the remedy provided by said law cannot be invoked by the plaintiffs, as they are not, within the terms thereof, taxpayers and are not authorized to make the protest and bring the suit provided for therein.

(9) Said law was approved and made effective June 7, 1933, and has not been interpreted by the highest courts of Texas.

(10) As plaintiffs do not personally pay said tax, and have no control over those paying the same for their account, they cannot refuse payment thereof and defend a suit by the State to recover the same, and even if they could the excessive penalty for testing the law, coupled with the clouding of their title, as it does, would be prohibitive.

Wherefore, premises considered, plaintiffs pray that a temporary injunction be granted herein enjoining the defendants and each of them from interfering with the con- [fol. 15] tractual relations between the plaintiffs, their lessees, and the purchasers of their royalty oil, by demanding or collecting said tax on such oil, and requiring, pending final hearing hereof, all monies in or coming into the hands of the defendants as the two per centum gross pro-

duction tax charged, demanded and collected from royalty oil, of plaintiffs to be impounded and not paid or put to the credit of the funds of the state, but be held for the use and benefit of the plaintiffs, and enjoining the defendants, and each of them, from demanding any part of said gross production tax attributable to royalty oil of the plaintiffs, and that on final hearing said temporary injunction to be made permanent and the cloud cast on the title of plaintiffs' oil royalty interest in the lands hereinbefore described and by virtue of the lien sought to be fixed thereon by said laws, be cancelled and annulled; that the defendants be required to account to the plaintiffs for the money in or coming into their hands as or for account of said unlawfully charged gross production tax, levied against plaintiffs said royalty, and on such accounting that they have judgment against the defendants for the amount ascertained to have been withheld from them, with 6% interest thereon; and, that the plaintiffs have all such other and further relief in the premises both general and special to which they may be entitled, in law or in equity.

William R. Watkins, Attorney for the Plaintiffs.

Duly sworn to by George Thompson, Jr. Jurat omitted in printing.

[fol. 16] In Chambers, this the 14th day of Dec. 1934

Upon consideration of the foregoing petition, it is ordered that the Plaintiff's Application for Temporary Injunction be and the same is hereby set for Jan. 7, 1935, at 9 A. M.

C. A. Wheeler, Judge, 53rd Judicial District of Texas.

[File endorsement omitted.]

[fol. 17] IN DISTRICT COURT OF TRAVIS COUNTY

[Title omitted]

DEFENDANTS' ORIGINAL ANSWER—Filed Jan. 24, 1935

To the Honorable Judge Presiding:

Come now the defendants in the above numbered and entitled cause and file their answer to plaintiffs' Original Petition and for answer to same:

I

Defendants demur generally to plaintiffs' petition and say that the same states no ground for relief, of which general demurrer defendants pray judgment of the Court.

II

Without waiving the foregoing demurrer, but still insisting on same, defendants deny all and singular the allegations contained in plaintiffs' petition except those allegations constituting substantially the stipulations of fact signed by attorney for the plaintiffs and defendants and filed with the Court.

Wherefore, defendants pray that the temporary injunction heretofore granted by this Honorable Court be dissolved, and that plaintiffs take nothing and have no relief by their suit.

Hubert T. Faulk, Assistant Attorney General, Attorney for Defendants.

[File endorsement omitted.]

[fol. 18] IN DISTRICT COURT OF TRAVIS COUNTY

[Title omitted]

Portions of Agreed Statement of Facts—Filed Feb. 23, 1935

STIPULATION

For the purpose of the hearing on the application of the plaintiffs for an interlocutory and permanent injunction,

the parties to the above entitled and numbered cause agree that the following facts are true:

* * * * * * *

II

Thereafter the defendant, Comptroller, pursuant to the terms of said law authorizing him to make rules and regulations promulgated rules and regulations and forms of reports as follows:

* * * * * * *

(1) All purchasers of crude oil are required to file forms No. 100 (hereinafter described). They shall pay the tax upon purchases and are required to deduct such tax in making settlement with the producers and/or royalty owners.

* * * * * * *

The producer must report the gross production from each lease operated, regardless of the interest holders and royalty interests.

* * * * * * *

(6) The producer must report that oil which he delivers to the royalty owner for his share of the production commonly known as "payment in kind." The purchaser or royalty owner receiving such oil will report and remit the tax on the oil which has been received in payment on his royalty interests.

* * * * * * *

[fol. 19] (d) The Comptroller has prescribed form No. 200, above mentioned, being the monthly report required from producers and which may be described as follows:

(1) "The name and address of the producer and period covered by the report must be shown.

* * * * * * *

(3) It is recited that producer must remit the tax on all oil stored or used.

* * * * * * *

(6) The following page of the report requiring computations to be made on the basis of 100% of the gross production requires a showing of the name and address of purchaser, County and name of lease in which produced, gross production, disposition and location of storage of the oil, both in barrels and by value.

* * * * * * *

(8) Under the "Instructions," the producer is further required to remit the tax on all oil placed in storage and not sold during the month covered by the report, and also on oil consumed in the operation or on the lease during the month.

(9) Under the heading "Instructions" on said form is the following paragraph:

"The producer is liable for a fine of not less than $25.00 nor more than $5,000.00 or confinement in the county jail for not less than one month nor more than six months or by both such fine and imprisonment for the failure to file forms 200, or 202 at the time prescribed by law."

(e) Forms Numbers 100 and 200, last above described, the rules and regulations under the heading "Instructions" on said forms; and the General Rules and Regulations promulgated pursuant to said House Bill No. 154, hereinbefore described, are now in full force and effect.

* * * * * * *

[fol. 20] IV

The Humble Oil & Refining Company, as producer thereof, has protested the payment of the gross production tax upon the royalty oil produced by Roeser & Pendleton, Inc., or its assigns, from the Cook ranch in Shackelford County, Texas, being the property mentioned in plaintiff's petition, in which the Mrs. M. M. Cook estate trustees plaintiffs herein, own substantially a one-half (½) royalty interest under the leases thereon as hereinafter stated; said protest being in each instance substantially as follows:

"House Bill 154 is invalid insofar as it attempts to impose a tax upon royalty and/or working interests of the

parties listed above and reflected in the statement mentioned in paragraph (7) hereof, for the following reasons:

"(1) Because the caption of the act is not sufficiently broad to authorize and justify the treatment in one Act of the subjects attempted to be covered.

"(2) Because the caption of the Act and the Act itself deals with two or more separate and distinct subjects, in violation of the constitution of the State of Texas.

"(3) Because the Act is property tax and not a tax imposed upon the business of engaging in the production of oil or producing oil.

"(4) Because the Act contains contradictory and ambiguous provisions.

"(5) Because the Act imposes upon the producer or purchaser the duty and responsibility of acting as agent for the State in the collection of the tax; makes him liable for the tax to the State; requires him to take from others property not belonging to him, and subjects him to a measure of liability which he cannot be required to assume; requires him to incur accounting and other expense in the collection of the tax, all without compensation, and in violation of the State and Federal prohibition against the taking of property without due process of law and the denial of the equal protection of the law.

"(6) Because, as to the royalty interests, the royalty owner is not engaged in the production of oil, and the tax attempted to be imposed cannot be justified as an occupation tax.

"(7) Because the Act attempts to abrogate vested contractual rights."

* * * * * * *

[fol. 21] VIII

On behalf of the plaintiffs in this case, the Humble Oil & Refining Company, the purchaser of plaintiffs' royalty oil, protested the payment and deduction of two (2%) per cent from the amounts due plaintiffs for the sale of their royalty oil to said Company on the form hereinabove men-

tioned, said protests covering the months and the amounts following:

December 1933	$52.30
January 1934	76.21
February	71.71
March	83.80
April	88.01
May	87.60
June	84.30
July	91.22
August	92.13
September	89.64
October	90.30

Pursuant to the foregoing protests, all of the money affected hereby has been delivered by the Comptroller to the State Treasurer and by the latter deposited and held in suspense account.

* * * * * * *

X

Mrs. M. M. (W. I.) Cook, of Albany, Shackelford County, Texas, during the year 1934 and up to her death on February 22, 1932, was the owner of the W. I. Cook Ranch, in Shackelford County, Texas, consisting of approximately 20,021 acres of land.

On May 11, 1925, Mrs. Cook executed, acknowledged and delivered, as lessor, to Roeser & Pendleton, Inc., a corporation, as lessee, three (3) oil, gas and mineral leases, identical in form, each dated May 11, 1925—Lease No. 1 covering 5,773 acres out of the Cook Ranch (including Sections 62 and 83 of the E. T. R. R. Co. Land)—Lease No. 2 covering 6,400 acres of land out of the Cook Ranch (including Sections 60, 61, 84, 85 and 88 of the E. T. R. R. Co. Land)—Lease No. 3 covering 5,760 acres of land out of the Cook Ranch. A copy of oil, gas and mineral Lease No. 2 is [fol. 22] attached hereto as Exhibit 1, and the terms and provisions of same are identical with the terms and provisions of Leases Nos. 1 and 3 mentioned.

Roeser & Pendleton, Inc., lessee named in said three oil, gas and mineral leases above referred to, drilled a dis-

covery well upon Section 60, E. T. R. R. Co. Land, and same was brought in as a producer on the 19th day of February, 1926. Following completion of this discovery well, Roeser & Pendleton, Inc., drilled over 400 wells on Sections 60, 61, 62, 83, 84, 85 and 88 of E. T. R. R. Co. Land on the Cook Ranch in Shackelford County, Texas, each of said wells being drilled to an approximate depth of 1,250 feet.

EXHIBIT I

Oil and Gas Lease 2830

Agreement, made and entered into the 11th day of May, 1925, by and between M. M. Cook for myself and as Independent Executrix of the Estate of W. I. Cook, deceased, of Albany, Texas, hereinafter called lessor (whether one or more), and Roeser and Pendleton, Inc., hereinafter called lessee:

Witnesseth: That the said lessor, for and in consideration of Six Thousand Four Hundred and No/100 ($6,400.00) Dollars, cash in hand paid, the receipt of which is hereby acknowledged, and of the covenants and agreements hereinafter contained on the part of lessee to be paid, kept and performed, have granted, demised, leased and let, and by these presents does grant, lease and let unto the said lessee for the sole and only purpose of mining and operating for oil and gas and of laying pipe lines and of building tanks, power stations and structures thereon to produce, save and take care of said products, all that certain tract of land situated in the County of Shackelford, [fol. 23] State of Texas, containing 6,400 acres, more or less, and described as follows, to-wit:

First Tract: Being Section No. 61, E. T. Ry. land, containing 640 acres.

Second Tract: Being Section No. 60, E. T. Ry. land, containing 640 acres.

Third Tract: Being Section No. 84, E. T. Ry. land, containing 640 acres.

Fourth Tract: Being Section No. 85, E. T. Ry. land, containing 640 acres.

Fifth Tract: Being Section No. 88, E. T. Ry. land, containing 640 acres.

Sixth Tract: Being Section No. 89, E. T. Ry. land, containing 640 acres.

Seventh Tract: Being Section No. 90, E. T. Ry. land, containing 640 acres.

Eighth Tract: Being Section No. 111, E. T. Ry. land, containing 640 acres.

Ninth Tract: Being Section No. 112, E. T. Ry. land, containing 640 acres.

Tenth Tract: Being Section No. 113, E. T. Ry. land, containing 640 acres.

Said ten tracts above described, containing in the aggregate 6,400 acres.

It is understood and agreed that an individed ½ interest of the oil and gas in and under the E. ½ of Sec. No. 60, above described has been heretofore conveyed by the fee owner to T. B. Owen and it is agreed that the lessee its heirs and assigns, shall be entitled to receive ⅞ of all the oil and gas in and under the E. ½ of said Section No. 60, and that said ⅛ of said oil and gas heretofore conveyed shall be delivered or paid from the ⅛ royalty reserved in this lease.

It is also understood and agreed that an undivided 1/16 interest to the oil and gas in and under Section No. 89 [fol. 24] E. T. Ry. Company land, containing 640 acres above described has been heretofore conveyed by the fee owner to S. Granman, and it is agreed that the lessee its assigns and successors shall be entitled to receive ⅞ of all the oil and gas in and under said Section No. 89, and said 1/16 of said oil and gas heretofore conveyed shall be delivered or paid from the ⅛ royalty from this lease.

It is further understood and agreed that an undivided 1/16 interest in the oil and gas in and under the E. ½ of section No. 111, above described containing 320 acres, has been heretofore conveyed to T. B. Owen, and that it is agreed that the lessee its assigns and successors shall be entitled to receive ⅞ of the oil and gas in and under the E. ½ of said Section No. 111, and that said 1/16 interest of said oil and gas heretofore conveyed shall be delivered or paid from the ⅛ royalty reserved in this lease.

It is also further understood and agreed that an undivided 1/16 interest of the oil and gas in and under the W. ½ of Section No. 112, E. T. Ry. Co. above described, containing 320 acres of land, has been heretofore conveyed

to Roy B. Jones, and it is agreed that the lessee its assigns and successors shall be entitled to receive 7/8 of all the oil and gas in and under said W. 1/2 of said Section No. 112, and that the said 1/16 interest of said oil and gas heretofore conveyed shall be delivered or paid from the 1/8 royalty reserved in this lease.

It is also further agreed and understood that an undivided 1/16 interest of the oil and gas in and under the E. 1/2 of Section No. 112 E. T. Ry. Co. above described, containing 320 acres of land has been heretofore conveyed by the fee owner to W. L. Thomas and it is agreed that the lessee its assigns and successors shall be entitled to receive 7/8 of all the oil and gas in and under the E. 1/2 of said Section No. 112 and that said 1/16 interest of said oil and gas heretofore conveyed shall be delivered or paid from [fol. 25] the 1/8 royalty reserved in this lease.

It is further understood and agreed that an undivided 1/16 interest of the oil and gas in and under Section No. 113, E. T. Ry. Co. above described containing 640 acres of land, has been heretofore conveyed to P. W. Reynolds, and it is agreed that the lessee its assigns and successors shall be entitled to receive 7/8 of all the oil and gas in and under said Section No. 113, and that said 1/16 interest of said oil and gas heretofore conveyed shall be delivered or paid from the 1/8 royalty reserved in this lease.

It is agreed that this lease shall remain in force for a term of five years from this date, and as long thereafter as oil or gas, or either of them is produced from the said land by the lessee.

In consideration of the premises the said lessee covenants and agrees:

1st. To deliver to the credit of lessor, free of cost, in the pipeline to which it may connect its wells, the equal one-eighty part of all oil produced and saved from the leased premises.

2nd. To pay the lessor 1/8 of the proceeds of such gas for the gas from each well where gas only is found, while the same is being used off the premises, and lessor to have gas free of cost from any such well for all stoves and all inside lights in the principal dwelling house on said land during the time by making her own connections with the well at her own risk and expense.

3rd. To pay lessor for gas produced from any oil well and used off the premises at the rate of 1/8 of the proceeds of all such gas for the time during which such gas shall be used. Also 1/8 of the proceeds of casing head gas.

If no well be commenced on said land on or before the 11th day of May, 1926, this lease shall terminate as to both parties, unless the lessee on or before that date shall pay or render to the lessor, or to the lessor's credit in the First [fol. 26] National Bank at Albany, Texas, or it- successors, which shall continue as the depository, regardless of changes in the ownership of said land, the sum of Sixteen Hundred and No/100 ($1,600.00) Dollars, which shall operate as rental and cover the privilege of deferring the commencement of a well for twelve months from said date. In like manner and upon like payments or tenders the commencement of a well may be further deferred for like periods of the same number of months successively. And it is understood and agreed that the consideration first recited herein, the down payment, covers not only the privilege granted to the date when said first rental is payable as aforesaid, but also the lessee's option of extending that period as aforesaid, and any and all other rights conferred.

Should the first well drilled on the above described land be a dry hole, then and in that event, if a second well is not commenced on said land within twelve months thereafter, this lease shall terminate as to both parties, unless the lessee on or before the expiration of said twelve months shall resume the payments of rentals in the same amount and in the same manner as hereinbefore provided. And it is agreed that upon the resumption of the payments of rentals, as above provided, that the last preceding paragraph hereof, governing the payment of rentals and the effect thereof, shall continue in force just as though there had been no interruption in the rental payments.

If said lessor owns a less interest in the above described land than the entire and undivided fee simple estate therein, then the royalties and rentals herein provided for shall be paid the said lessor only in proportion *with* interest bears to the whole and undivided fee.

Lessee shall have the right to use, free of cost, gas, oil and water produced on said land for all operations thereon, except water wells of lessor.

[fol. 27] When requested by lessor lessee shall bury all pipe line below plow depth.

No well shall be drilled nearer than 200 feet to the house or barn now on said premises without the written consent of the lessor.

Lessee shall pay for damages caused by all operations to growing crops on said land.

Lessee shall have the right at any time to remove all machinery and fixtures placed on said premises, including the right to draw and remove casing.

If the estate of either party hereto is assigned—and the privilege of assigning in whole or in part is expressly allowed—the covenants hereof shall extend to their heirs, executors, administrators, successors, or assigns, but no change in the ownership of the land or assignment of rentals or royalties shall be binding on the lessee until after the lessee has been furnished with a written transfer or assignment, or a copy thereof; and it is hereby agreed that in the event that this lease shall be assigned as to a part or as to parts of the above described lands and the assignee or assignees of such part or parts shall fail or make default in the payment of the proportionate part of the rents due from him or them, such default shall not operate to defeat or affect this lease so far as it covers a part or parts of said lands upon which the said lessee or any assignee thereof shall make due payment of said rental.

Lessor hereby warrants and agrees to defend the title to the lands herein described and agrees that the lessee shall have the right at any time to redeem for lessor, by payment, any mortgages, taxes, or other liens on the above described lands, in the event of default of payment by lessor, and be subrogated to the rights of the holder thereof.

It is understood that this lease is No. 2 of a series of three leases this day executed by and between the parties hereto, and in the event lessee shall drill a well on any of [fol. 28] said land, and produce and deliver in a pipeline on said lease or leases as much as ten barrels per day of oil for a period of thirty days in succession then and in such event such production shall operate to stop the payment of any further rentals on the lands, described in this lease in Nos. 1 and 3, which are companion leases to this one.

In testimony whereof, we sign, this the 11th day of May, 1925.

M. M. Cook, for Herself and as Independent Executrix of the Estate of W. I. Cook, Deceased.

Single Acknowledgment

THE STATE OF TEXAS,
County of Shackelford:

Before me, the undersigned authority, a Notary Public in and for the County of Shackelford and State of Texas, on this day personally appeared M. M. Cook, for herself and as independent executrix of the Estate of W. I. Cook, deceased, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that she executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office on this the 22nd day of June, A. D. 1925.

R. E. Dodge, Notary Public in and for Shackelford County, Texas. (L. S.)

THE STATE OF TEXAS,
County of Shackelford:

I, W. Floyd Jones, County Clerk in and for said County, do hereby certify that the foregoing instrument dated the 11th day of May, A. D. 1925, with its certificate of authentication, was filed for record in my office, the 23rd day of June, A. D. 1925, at 11:00 o'clock A. M., and duly recorded the 24th day of June, 1925, in the records of said County, [fol. 29] in Vol. 77 on page 42.

Witness my hand and the seal of the County Court of said County, at office in Albany, Texas, the day and year last written.

W. Floyd Jones, Clerk County Court, Shackelford County, Texas.

Compared 1161 Indexed

Producer's 88 Special

Lease No. 2

Oil and Gas Lease from M. M. Cook to Roeser and Pendleton, Inc.

This instrument was filed for record on the 23rd day of June, 1925, at 11:00 o'clock A. M., and duly recorded in Book —, page — of the — records of this office.
W. Floyd Jones, County Clerk, by —— ——, Deputy.

XI

Mrs. Cook, as stated, died on February 22, 1932, and her will was probated in the County Court of Shackelford County, Texas. George Thompson, Jr., and R. E. Nail were named as Independent Executors. R. E. Nail died in September, 1932, and since that date, George Thompson, Jr. has acted as sole Independent Executor, until September 1, 1933, when the executorship was closed and the Trust Estate established under Mrs. Cook's will commenced. Since September 1, 1933, Joseph H. Barwise and George Thompson, Jr., Trustees of Mrs. Cook's Estate, have been and are now the owners in fee of the oil, gas and mineral royalty reserved by Mrs. Cook in the oil and gas leases hereinbefore mentioned with the exception of the one-fourth of said royalty given by Mrs. Cook in 1927 to the W. I. Cook Memorial Hospital, and an additional one-fourth which she [fol. 30] gave to said Hospital upon her death, and with the further exception of the small outstanding fractional interests in two or three of the sections. In other words, Joseph H. Barwise and George Thompson, Jr., Trustees, since September 1, 1933, have been and are now the owners of substantially one-half of the royalty reserved by Mrs. Cook in said oil, gas and mineral leases mentioned.

XII

Roeser & Pendleton, Inc., and its assigns, have had the exclusive control and operation of the oil, gas and mineral

development and production of oil from the Cook Ranch, and that at no time has either Mrs. W. I. Cook or the Trustees of her estate ever exercised, or attempted to exercise, any degree of control over oil operations on said Cook Ranch; and at no time has either Mrs. Cook or the Trustees of her estate ever produced any oil from the Cook Ranch, or ever been in the occupation of producing oil from the Cook Ranch, but on the contrary Roeser & Pendleton, Inc., and its assigns, have been the sole and exclusive producers of oil and gas from said Cook Ranch, and no other person, save Roeser & Pendleton, Inc. and its assigns, has been engaged in such occupation named. In connection with the foregoing, and in using the phrase, "Roeser & Pendleton, Inc., and its assigns," it is meant to include in said term the assigns of Roeser & Pendleton, Inc., but neither Mrs. Cook nor the Trustees of her estate, has been such assigns, but they have at all times been merely the owner of substantially one-half of the royalty oil produced from the Cook Ranch by Roeser & Pendleton, Inc., lessee and its assigns.

* * * * * * *

XIV

That on September 1, 1933, the Humble Oil & Refining Company was purchasing all of the oil produced from [fol. 31] said Cook Ranch, including the substantially one-half oil royalty owned by the Trustees of Mrs. Cook's Estate, upon written Division Orders, all identical in form, but varying as to percentage of interest, a copy of one of said Division Orders being attached hereto and marked Exhibit 2. Under said Division orders, said Humble Oil & Refining Company had been paying to the Trustees of Mrs. Cook's estate, and continued to pay, until 2% gross production tax law (mentioned in plaintiffs' petition) went into effect, the full market value and posted price for said oil, without deduction except for a small allowance for basic sediment, as provided for in the Division Orders.

EXHIBIT 2

Humble Oil & Refining Company

Division Order No. 2107

Effective 7 A. M. February 1, 1932

To Humble Oil & Refining Co., Houston, Texas:

The undersigned certify and guarantee that they are the owners of the oil, including royalty interest, produced from wells, No. 1 and up, on the W. I. Cook farm or lease, in Oil Field in Shackelford County, Texas, which farm or lease is described as follows:

All of the N. ½
N. ½ of S. W. ¼
N ½ of the S. E. ¼ and
S. W. ¼ of S. E. ¼ of Section 84,
E. T. R. R. Co. Lands,
Abstract No. 1388.
Shackelford County, Texas.

Until further written notice, you are authorized, for your own account, to receive such oil into your own possession or the possession of any person or corporation designated by you, same to be run and measured in accordance with the customary pipeline rules and regulations, including adjustments and deductions provided for by the [fol. 32] rules of the Texas Railroad Commission, such oil to be credited as follows:

Credit to W. I. Cook Memorial Trust; Division of Interest ½ of ⅛; Postoffice Address, Fort Worth, Texas.

Credit to R. E. Nail & Geo. Thompson, Jr.; Independent Executors and Trustees Mrs. W. I. Cook Estate; Division of Interest ½ of ⅛; Postoffice Address, Albany, Texas.

The oil run hereunder shall on the terms herein contained become the property of Humble Oil & Refining Company immediately upon being received into the possession of said Company or its designated agent, and said Company agrees to receive and pay for such oil to the respective owners according to the division of interest hereinabove indicated at its posted per barrel (42 gallons) field price for similar crude in the field where received prevailing on the

date of each respective run, settlements, and payment to be made monthly by check of Humble Oil & Refining Company mailed to the respective parties at the addresses above given.

Each undersigned hereby warrants and guarantees the title to the oil credited to such undersigned owner according to the division of interest hereinabove indicated, as well as all interest hereafter acquired and agrees to furnish abstract of title, and in case of any adverse claim of title to such oil or any part thereof, or to the land from which such oil is produced to furnish Humble Oil & Refining Company satisfactory indemnity bond against such adverse claim or claims and to authorize Humble Oil & Refining Company to retain the purchase price without any obligation to pay interest on the amount so withheld, until such land shall be furnished or until dispute as to the ownership is settled.

Witnesses: (Witnesses Omitted).

[fol. 33] XV

In the month of December, 1933, the Trustees of Mrs. W. I. Cook Estate, received from Humble Oil & Refining Company a printed letter, dated December 14, 1933, copy of which is attached and marked Exhibit 3.

EXHIBIT 3

Humble Oil & Refining Company

Houston, Texas, December 14, 1933.

Mrs. Cook Estate, re Oil Run Division Order—File Ans. 12-26-33

To all Royalty and Other Owners of Oil from Whom Humble Oil & Refining Company Is Purchasing Crude Oil Within the State of Texas:

You are advised that H. B. No. 154, passed by the Forty-third Legislature, State of Texas, and appearing as Chapter 162 of the General Laws of that session, and which took effect on September 1, 1933, levied taxes on the production

of oil in the State at the rate of 2¢ per barrel so long as the market price thereof is $1.00 per barrel or less, and 2 per cent of the market value when the market value is above $1.00 per barrel, and in addition thereto a regulation pipe line tax of 1/10th of one cent per barrel.

You are further advised that under the law it is made the duty of the purchaser of the oil to collect or deduct said taxes from the proceeds of the oil purchased and remit the amount so deducted to the Treasurer of the State of Texas at Austin.

You are further advised that the law referred to provides that all oil owners, whether owners of royalty or working interests, shall bear this tax, each to pay such part thereof as his interest in the production bears to the entire production, subdivision (6), Sec. 2 of House Bill 154 reading as follows:

[fol. 34] "The tax herein levied shall be borne ratably by all interested parties, including royalty interests; and producers and/or purchasers of oil are hereby authorized and required to withhold from any payments due interested parties, the proportionate tax due."

In compliance with the law Humble Oil & Refining Company has deducted and paid to State Treasurer your proportion of said taxes for the months of September, 1933 and October, 1933, and will each month hereafter deduct a sufficient amount from the proceeds of the oil so purchased to cover each owner's proper proportion of said taxes, and will pay same to the State Treasurer as required by said law.

The enclosed check represents the remainder of the proceeds of your oil purchased during the month of November, 1933, after your part of the tax had been deducted, and paid to State Treasurer, as shown by the accompanying statement. Your attention is called to the fact that the tax imposed by said law shall be paid on the actual oil produced without any tank table deductions and this information is given you to aid you in understanding this statement.

Hereafter similar statements showing the deduction for taxes will be sent you monthly with our checks covering payment for other runs.

Yours very truly, Humble Oil & Refining Company,
James Anderson, Vice President.

XVI

That neither Mrs. W. I. Cook, during her lifetime, nor the executor or Trustees of her estate; have ever been producers, managers or operators of the oil property upon the Cook Ranch, but at all times since the discovery well was brought in in 1926, Roeser & Pendleton, Inc., the lessee, and its assigns, have been the exclusive producers, managers and operators of said property.

That at all times since the discovery well was brought in in February, 1926, Roeser & Pendleton, Inc., lessees, and its [fol. 35] assigns, have had the exclusive right to enter upon the Cook Ranch and explore, manage, develop and operate the same for oil and gas, and to produce and save oil therefrom, being accountable to Mrs. Cook and to the executors and trustees of her estate, for her and their part of the royalty oil and gas provided for in the leases hereinbefore mentioned, copy of one of which is attached hereto and marked Exhibit I.

That at no time since the discovery well was brought in on the Cook Ranch in February, 1926, has either Mrs. Cook or her executors or Trustees ever been engaged in the occupation or business of producing oil from the Cook Ranch or elsewhere, but on the contrary, have merely received from the purchaser, the purchase price for their part of the royalty oil produced from said Cook Ranch by Roeser & Pendleton, Inc., lessee, and its assigns.

XVII

That since September 1, 1933, there has currently been deducted by Humble Oil & Refining Company from the market price of the royalty oil owned by the Trustees of Mrs. W. I. Cook Estate, 2% has been paid over by Humble Oil & Refining Company to the State Comptroller of the State of Texas, with notice that the payment of same has been protested by the Trustees of the Cook Estate, giving as the grounds or bases for such protest, the grounds set forth in plaintiffs petition—that the State law levying such tax is unconstitutional; and at no time have the Trustees of the Cook Estate ever personally paid said 2% tax, nor did they have any control over the Humble Oil & Refining Company's paying said 2% of the market value of their royalty oil to the State Comptroller; nor do they have any control over the character or wording of the protest made by the

Humble Oil & Refining Company to the State Comptroller accompanying each such 2% payment. And in this connection, the Trustees of the Cook Estate have no control over [fol. 36] any other person charged with the duty and obligation of deducting and paying 2% of the value of the Trustees' royalty oil, with respect to making such deduction and payment, and the character of protest given in connection with each such payment.

XVIII

That the approximate one-half royalty oil interest owned by Mrs. W. I. Cook Estate was duly assessed for taxation for State, County, School and Road District purposes by the State and County Tax Assessor of Shackelford County, and by the Tax Collector of the Albany Independent School District, and State, County, School and Road District taxes have been duly paid on said royalty interest each year since Mrs. Cook's death on February 22, 1932, and that during the lifetime of Mrs. W. I. Cook, her said oil royalty interest was duly assessed for State, County, School and Road District purposes by the taxing authorities of Shackelford County, Texas, and she duly paid the taxes assessed against same.

XIX

The correspondence attached hereto, marked Exhibits 4 to 10 inclusive, passed between the Humble Oil & Refining Company and plaintiffs.

* * * * * * *

EXHIBIT 6

Mrs. W. I. Cook Estate: re Division Order

File—Your File—re Gross Production Tax

January 12, 1934.

Attention Mr. J. Q. Weatherly

Humble Oil & Refining Company, Houston, Texas.

DEAR SIRS:

Your letter of January 8th received, acknowledging my letter of December 26th concerning payment to State of

Texas of gross production tax thought to be due by Mrs. [fol. 37] Cook's estate under provisions of House Bill No. 154.

You have misconstrued my letter of December 26th. I did not intend to make request that you make payment of tax, so far as Mrs. Cook's estate is concerned under protest, but that you withhold the payment of the tax, or else any payment that you might make would be at your risk. As stated in your letter, the request was intended to become effective as of December oil run payment.

As stated in my letter of December 26th, I understand the constitutionality of House Bill 154 is now involved in a pending suit brought by royalty owners, and should the tax, as to royalty owners be held invalid, then any payments made by you, not deducted from Mrs. Cook's royalty oil, would be without justification. Until the validity of such law is therefore determined, you should either hold back the tax and not make payment to the state, or else make the payment at your risk.

Very truly yours, —— ——, Independent Executor, Mrs. W. I. Cook's Estate.

EXHIBIT 7

Humble Oil & Refining Company

Legal Department

Houston, Texas, January 15, 1934.

Re Gross Production Tax, Mrs. W. I. Cook's Estate

Mrs. George Thompson, Jr., Independent Executor, Mrs. W. I. Cook's Estate, Fort Worth, Texas.

DEAR SIR:

I have your letter of January 12th, 1934, demanding that we withhold payment of the tax due the State on the royalty interest of the Estate of Mrs. W. I. Cook.

[fol. 38] You, of course, understand that we cannot do this. The law places upon us, as a producer of the oil, the obligation of deducting and paying to the State the tax on

the royalty as imposed by the act. This is the first demand and request which we have ever had to refrain from making the deduction. All others have permitted us to go ahead and make the payment in full to the State under protest. We will be glad to take that action for you. If this is not agreeable to you, I presume that it is a matter which will have to be taken up with the management as to whether or not, under the circumstances, we should make delivery to you in kind of your part of the oil.

With reference to this, please advise at your earliest convenience.

Yours very truly, Jno. Q. Weatherly.

jqw:jd.

XX

Prior to September of 1933, no part of the gross production tax (payable under the gross production tax laws of Texas, in force prior to the effective date of House Bill No. 154 enacted by the 43rd Legislature at its regular session) was charged to or paid directly or indirectly, or borne directly or indirectly, by Mrs. M. M. Cook estate, or the Mrs. M. M. Cook Memorial Trust. On the contrary, the amounts set forth in paragraph XIV, hereof, as having been paid for royalty oil from the Cook Ranch were paid by the purchaser of the oil, to the said Mrs. M. M. Cook, her Estate and Memorial Trust, without any deduction whatever directly or indirectly on account of the gross production tax payable under the Texas Law.

The entire gross production tax levied under laws in force in Texas prior to September, 1933, was payable by the producer of oil on said Cook Ranch upon the full 100 per cent production of oil therefrom.

[fol. 39] It was the universal custom, practice and construction, of the former gross production tax laws of Texas, (in force prior to September, 1933) not to charge any part of the gross production tax levied thereby against the interest of the oil royalty owner, but the same was charged against and collected from the producer, owning, controlling, managing and operating oil wells in Texas, based upon 100 per cent of the production therefrom and a producer

was never construed by the officers of the State collecting said tax, as including a royalty owned.

* * * * * * *

Wm. McCraw, Attorney General; Hubert Faulk, Asst. Atty. General, Attorneys for Defendants.
William R. Watkins, Attorney for Plaintiffs.

[File endorsement omitted.]

[fol. 40] IN DISTRICT COURT OF TRAVIS COUNTY

54,822

TRUSTEES OF MRS. M. M. (W. I.) COOK ESTATE

vs.

GEORGE H. SHEPPARD, as Comptroller of the State of Texas, et al.

JUDGMENT—Feb. 23, 1935; Filed Feb. 28, 1935

On the 4th day of February, 1935, the above entitled and numbered cause came on to be heard upon the pleadings and the agreed statement of facts filed herein by the parties, and the Court having heard and considered the same, is of the opinion that the general demurrer of the defendants to the plaintiff's petition ought to be sustained because:

(1) The plaintiff's have an adequate remedy at law, and

(2) The law assailed is constitutional;

It is, therefore, on this the 23rd day of February, 1933, ordered, adjudged and decreed by the Court that the defendants' general demurrer to the plaintiff's petition be, and the same is hereby sustained, and the plaintiffs declining to amend, the cause is hereby dismissed.

It is further ordered by the Court that all costs incurred herein be, and they are hereby assessed against the plaintiffs.

To which action and ruling of the Court the plaintiffs excepted and at the same time in open Court gave notice

of appeal to the Court of Civil Appeals for the Third Supreme Judicial District of Texas, at Austin, Texas.

C. A. Wheeler, Judge 53rd Judicial District Court.

[File endorsement omitted.]

[fol. 41] IN COURT OF CIVIL APPEALS OF TEXAS

ASSIGNMENTS OF ERROR FROM APPELLANTS' BRIEF

I

The court erred in sustaining defendants' demurrer to plaintiffs' petition.

II

The court erred in holding House Bill 154, Acts 1933, did not violate the obligation of contract clause of the State Constitution.

III

The court erred in holding House Bill 154, Acts 1933, did not violate the obligation of contract clause of the Federal Constitution.

IV

The court erred in holding House Bill 154, Acts 1933, did not violate the due process clause of the State Constitution.

V

The court erred in holding House Bill 154, Acts 1933, did not violate the due process clause of the 14th amendment to the Federal Constitution.

VI

The court erred in holding that House Bill 154, Acts, 1933, was not violative of Article 3, Section 35, of the Texas Constitution.

VII

The court erred in holding that the challenged law does not violate the equal protection clauses of the State and Federal Constitutions.

VIII

The Court erred in holding that House Bill 11, chapter 214, Acts of the 43rd Legislature 1933, provides a plain, speedy and adequate remedy at law.

[fol. 42]

IX

The court erred in refusing to give judgment in favor of the plaintiffs, regardless of their right to permanently enjoin enforcement of House Bill 154, for the amount of royalty oil held in suspense by the defendants.

X

The court erred in holding the law in question did not impose a property tax on plaintiff's royalty in violation of the property tax provisions of the Texas Constitution.

[fol. 43] In Court of Civil Appeals of Texas

No. 8321

Trustees of Mrs. M. M. (W. I.) Cook Estate

vs.

George H. Sheppard, as State Comptroller of the State of Texas

Appeal from District Court of Travis County

Opinion by Associate Justice Blair

Judgment—Nov. 13, 1935

This cause came on to be heard on the transcript of the record and same being inspected, because it is the opinion of the Court that there was no error in the judgment—It is, therefore, considered, adjudged and ordered that the judgment of the trial court be, and the same is, hereby in all things affirmed. That the appellants, Joseph H. Barwise and Geo. Thompson, Jr., as Trustees of the Estate of Mrs. M. M. (W. I.) Cook, Deceased, principals and Employers Liability Assurance Corporation, Limited, surety, pay all costs in this behalf expended, and this decision be certified below for observance.

[fol. 44] In Court of Civil Appeals of Texas

Assignments of Error in Motion for Rehearing—Filed Nov. 27, 1935

I

The court erred in holding the defendants' demurrer to plaintiffs' petition was properly sustained.

II

The court erred in holding that House Bill 154, Acts of 1933, as amended, does not violate the obligation of contract clause of the State Constitution.

III

The court erred in holding House Bill 154, Acts of 1933, as amended, does not violate the obligation of contract clause of the Federal Constitution.

IV

The court erred in holding House Bill 154, Acts of 1933, as amended, does not violate the due process clause of the State Constitution.

V

The court erred in holding House Bill 154, Acts of 1933, as amended, does not violate the due process clause of the Fourteenth Amendment of the Federal Constitution.

VI

The court erred in holding that House Bill 154, Acts 1933, as amended, was not violative of Article 3, Section 35, of the Texas Constitution.

VII

The court erred in holding that House Bill 154, Acts 1933, as amended, does not violate the equal protection clauses of the State and Federal Constitutions.

VIII

The court erred in impliedly holding that plaintiffs had no right to sue to enjoin the enforcement of House Bill 154, Acts of 1933.

[fol. 45]

IX

The court erred in holding that the plaintiffs are not entitled to judgment against the defendants for the amount held in suspense which has been deducted and withheld from plaintiffs' oil royalty and turned over to the defendants.

X

The court erred in holding that House Bill 154, Acts of 1933, as amended, does not impose a property tax on plaintiffs' royalty in violation of the provision of the Texas Constitution, requiring taxation to be equal and uniform, limiting the amount thereof to 35¢ on the $100.00 valuation, and the provision requiring the levy, assessment and collection of taxes in the County where the property is situated.

XI

The court erred in holding that the Legislature had authority to declare that plaintiffs, royalty owners, are engaged in the business of producing oil, and are therefore subject to and may therefore be required to pay a gross production tax on their royalty, the facts admitted by the demurrer and agreed to in the stipulation of facts filed herein, being that plaintiffs are not in anywise engaged as producers of oil.

XII

The court erred in holding that the obligations of plaintiffs' contract with their lessee that said lessee should "deliver to the credit of the lessor, free of cost, in the pipe line to which it may connect its wells the equal one-eighth (⅛th) part of all oil produced and saved from the leased premises," was not unlawfully impaired in violation of State and Federal Constitutions, by requiring their lessee to withhold or direct the purchaser to withhold 2% of the value of plaintiffs' oil.

[fol. 46]

XIII

The court erred in holding that plaintiffs' contract with the purchaser of their royalty oil was not unlawfully impaired by the requirement that said purchaser withhold from the plaintiffs 2¢ on the dollar, or 2% thereof, to be paid over to the defendants.

XIV

The court erred in holding that the Legislature had Constitutional authority, contrary to the provisions of plaintiffs' lease to require the plaintiffs to bear, or pay any part of a tax assessed as an excise or occupation tax on the privilege of engaging in the business of producing oil where payment of such tax is required to be made, deducted, or withheld by plaintiffs' lessee and purchaser of their oil.

XV

The court erred in holding that the nature of lessors rights under an oil lease were such as to justify the holding that the lessor was engaged in a business or occupation, and thereby subject to the tax in question.

[fol. 47] IN COURT OF CIVIL APPEALS OF TEXAS

[Title omitted]

ORDER OVERRULING MOTION FOR REHEARING—December 18, 1935

Appellant's motion for rehearing. Motion is submitted and overruled.

[fol. 48] IN SUPREME COURT OF TEXAS

TRUSTEES OF MRS. M. M. (W. I.) COOK ESTATE, Plaintiffs in Error,

vs.

GEORGE H. SHEPPARD, as Comptroller of the State of Texas, et al., Defendants in Error

ASSIGNMENTS OF ERROR IN PETITION FOR WRIT OF ERROR—Filed January 20, 1936

I

The Court of Civil Appeals erred in holding the Legislature and defendants could, consistently with the due process clauses of the State and Federal Constitutions, and to ac-

complish the objects of the law in question, say plaintiffs are engaged in the business of producing oil and tax them as for engaging in such business, when they are not in fact engaged therein. (Grounds I, IV, VIII, IX, XI, XV, Plaintiffs' Motion for Rehearing Court of Civil Appeals.)

II

The Court of Civil Appeals erred in holding that House Bill 154, Acts of 1933, as amended, does not impose a property tax on plaintiffs' royalty in violation of the provisions of the Texas Constitution requiring taxation to be equal and uniform, limiting the amount thereof to 35¢ on the $100.00 valuation, and the provision requiring the levy, assessment and collection of taxes in the County where the property is situated. (Grounds I, VIII, IX, X, Plaintiffs' Motion for Rehearing Court of Civil Appeals.)

III

Plaintiffs' leases having vested in the lessee the exclusive right to produce oil, and obligated it to deliver the royalty oil to the lessor's credit in the pipeline free of cost, the Legislature and defendants cannot, consistently with the [fol. 49] obligation of contract clauses of the State and Federal Constitutions, authorize or require the lessee to deliver the royalty oil burdened with a tax on the privilege of engaging in the business of producing it, thereby relieving the lessee of a portion of the cost of production, making the royalty interest less valuable and the method of enforcing the lease entirely different than when the lease was made, and the Court of Civil Appeals erred in holding the contrary. (Grounds I, II, III, VIII, IX, XII, XIV, Plaintiffs' Motion for Rehearing Court of Civil Appeals.)

IV

The Court of Civil Appeals erred in holding that plaintiffs' contract with the purchaser of their royalty oil was not unlawfully impaired by the requirement that said purchaser withhold from the plaintiffs 2¢ on the dollar, or 2% thereof, and pay same to the defendants. (Grounds I, XIII, Plaintiffs' Motion for Rehearing Court of Civil Appeals.)

V

The Court of Civil Appeals erred in holding that House Bill 154, Acts 1933, as amended, was not violative of Article 3, Section 35, of the Texas Constitution. (Grounds I, VI, VIII, IX, Plaintiffs' Motion for Rehearing Court of Civil Appeals.)

VI

The Court of Civil Appeals erred in holding that House Bill 154, Acts 1933, as amended, does not violate the equal protection clauses of the State and Federal Constitutions. (Ground VII Plaintiffs' Motion for Rehearing Court of Civil Appeals.)

VII

The Court of Civil Appeals erred in impliedly holding that plaintiffs had no right to sue to enjoin the enforcement of House Bill 154, Acts of 1933. (Grounds I and VIII Plaintiffs' Motion for Rehearing Court of Civil Appeals.)

[fol. 50] IN SUPREME COURT OF TEXAS

[Title omitted]

ORDER DENYING WRIT OF ERROR—February 5, 1936

This day came on to be heard the application of plaintiff in error for a writ of error to the Court of Civil Appeals for the Third District, and the same having been duly considered, it is ordered that the application be refused; that applicants, Trustees of Mrs. M. M. (W. I.) Cook Estate, and surety, Employers Liability Assurance Corporation, Limited, pay all costs incurred herein.

[fol. 51] IN SUPREME COURT OF TEXAS

[Title omitted]

MOTION FOR REHEARING—Filed February 14, 1936

Plaintiffs in error respectfully pray a rehearing on their petition for writ of error which was denied on February 5, 1936, on the following grounds:

I

The Court of Civil Appeals, and this court by refusing the writ of error, erred in holding the Legislature and defendants could, consistently with the due process clause of the Federal Constitution, arbitrarily provide in the law in question that plaintiffs are engaged in the business of producing oil, when they are not in fact so engaged, in order to pay upon them a tax for which they could not be held liable unless they were so engaged.

II

Plaintiffs antecedent leases having obligated the lessee to deliver plaintiffs' royalty oil to their credit in the pipeline free of cost, the Court of Civil Appeals and this court by refusing the writ of error, erred in holding that the obligation of said leases was not impaired in violation of the obligation of contract clause of the Federal Constitution, by the tax law in question, which authorizes and requires the deduction of two per cent of the proceeds of plaintiffs' oil [fol. 52] and the addition of a like amount to the proceeds of lessee's oil, which relieves the lessee of a part of the cost of producing the oil, makes the plaintiff's royalty interest less valuable, and the method of enforcing the lease entirely different than when it was made.

III

The Court of Civil Appeals, and this Court in refusing the writ of error, erred in holding that the provision of the law in question which requires the purchaser of the oil to withhold two percent of the contract price thereof, does not impair the obligation of said sale contract in violation of the obligation of contract clause of the Federal Constitution.

IV

The Court of Civil Appeals, and this Court in refusing the writ of error, erred in holding that the law in question does not violate the equal protection clause of the Federal Constitution when it is interpreted to mean that royalty oil belonging to the State is exempt from the tax in question although such royalty oil is produced under the same circumstances as other royalty oil.

It is admitted plaintiffs are not producers of oil. The Legislature has arbitrarily declared they are producers in order to impose on them part of a tax for which they could not otherwise be held liable. The Legislature has no authority to ignore the facts and arbitrarily say plaintiffs are producers when they are not. The attempt to so classify them in order to reach their property, which could not otherwise be taken for the purpose, deprives them of their property without due process of law, in violation of the due process clause of the 14th Amendment to the Federal Constitution.

[fol. 53] Under plaintiffs' lease contract the cost of engaging in the business of producing oil is to be borne by the lessee. A part of such cost is the tax imposed on the lessee for the privilege of engaging in the business. The law in question takes from the lessor two per cent of the income the lessee agreed to pay him under the contract, and adds it to the lessee's income. The law clearly intended this result and intended that the lessee should not be responsible to the lessor for the amount so deducted and added. This clearly impairs the obligation of the lease in violation of the obligation of contract clause in the Federal Constitution. The same is true of the contract for the sale of the oil.

Respectfully submitted, William R. Watkins, Attorney for Plaintiffs in Error.

The Attorney General, Austin, Texas, is Attorney for Defendants in Error.

[File endorsement omitted.]

[fols. 54 & 55] IN SUPREME COURT OF TEXAS

[Title omitted]

ORDER OVERRULING MOTION FOR REHEARING—February 26, 1936

It is ordered by the Court that the motion for rehearing herein be overruled.

[fol. 56] In Court of Civil Appeals of Texas

No. 8159

Group No. 1 Oil Corporation, Appellant,

vs.

Geo. H Sheppard, Comptroller, et al., Appellees

Appeal from District Court, Travis County

Opinion—Filed Nov. 27, 1935

Appellant, Group No. 1 Oil Corporation, sued appellees, Geo. H. Sheppard, State Comptroller, and Charley Lockhart, State Treasurer, for the refund of certain gross production taxes on oil, which appellant paid under written protest to appellees. The taxes were alleged to have been wrongfully demanded and collected as being due under the provisions of House Bill No. 154, Acts 43rd Legislature, as amended and reenacted by House Bill No. 55 of the 1st Called Session of the same Legislature, which Acts will be herein referred to as H. B. 154, or the Act, tne material portions of which read, as follows:

"Section 1. (1) For the purpose of this Act 'producer' shall mean any person or persons, corporation, partnership, individual, trustee, receiver, trust estate or administrator owning, controlling, managing or leasing any oil well or any person who produces in any manner any oil by taking it from the earth or waters in this State."

"Section 2. (1) There is hereby levied an occupation tax on oil produced within this State of two (2) cents per barrel of forty-two (42) standard gallons. * * *"

"(2) The tax hereby levied shall be a liability of the producer of oil and it shall be the duty of such producer to keep accurate records of all oil produced, making monthly reports under oath as hereinafter provided."

"(3) The purchaser of oil shall pay the tax on all oil purchased and deduct tax so paid from payment due producer or other interest holder, making such payments so deducted to the Comptroller of Public Accounts by legal tender or cashier's check payable to the State Treasury.

"Provided, that if oil produced is not sold during the [fol. 57] month in which produced, then said producer shall pay the tax at the same rate and in the manner as if said oil were sold."

"(6) The tax herein levied shall be borne ratably by all interested parties, including royalty interests; and producers and/or purchasers of oil are hereby authorized and required to withhold from any payments due interested parties, the proportionate tax due."

The refund of three items of taxes was sought by appellant's petition. The sum of $1,326.25 alleged to have been wrongfully demanded and collected by appellees as the gross production tax on the one-eighth royalty interest of the State University in the oil produced from its Reagan County lands by appellant as lessee thereof and as producer of the oil. The taxes were paid either by appellant or by the purchaser of the oil in the manner prescribed by the taxing act. Another item was for the sum of $209, which was also demanded and collected by appellees as the gross production tax on the one-eighth royalty interest of the University in the oil produced from its lands in Reagan County. The third item was for the sum of $242.27, as to which item appellant alleged that in addition to being a producer of oil, it was the owner of and entitled to receive royalties on oil produced in divers and sundry places from privately owned lands; that the producing operations were conducted by other corporations as lessees, and that these lessees, or purchasers from them, had deducted from settlements with appellant for its royalty interests the sum of $242.27, and in turn had remitted that amount to appellees. The legal consequence was that appellant had thereby been forced to pay and had paid the sum of $242.27 to appellees as the gross production or occupation tax on its royalty interests in the privately owned lands. All of the claims covered payments of taxes for the months of September and December, 1933; and the payments were made under the written protest of appellant as required by H. B. [fol. 58] No. 11, Acts of the 43rd Legislature, which provides that such protested taxes be kept in the "Cash Suspense Book" or account, subject to the suit of the taxpayer for its refund, if unlawfully collected.

The trial court sustained the general demurrer and several special exceptions of appellees to the petition of appellant, and upon its declining to amend dismissed the suit. It was admitted by all parties that because of various constitutional inhibitions the University could not be charged with the gross production tax on its one-eighth royalty interest in the oil produced from its lands; but the trial court construed the Act as imposing the gross production tax due on the one-eighth royalty interest of the University upon appellant, the "producer" of the oil as that term is defined in Section 1 of the Act; and accordingly sustained the general demurrer.

By an excellent brief the Attorney General seeks to sustain the trial court's construction of the Act, and to defend it against the attack that if so construed the Act is unconstitutional. On the other hand, by the excellent briefs of counsel for appellant and of Messrs. Black and Graves, appearing Amici Curiae, representing the Big Lake Oil Company, a lessee of oil producing lands belonging to the University, the contention is made that under a proper construction of the Act, the gross production taxes on oil is levied against the various interest holders, including the producer and royalty owners, in proportion to their respective interests, and as thus construed no greater burden is imposed by the Act on the lessees of University lands than on other lessees of oil producing lands privately owned. That if the Act be construed as imposing the tax upon the lessee producer of oil from University lands on all of the oil produced, and as imposing the tax upon producers of oil from privately owned lands at the same rate per bar- [fol. 59] rel, but on only a fraction or portion of the oil produced, the Act is void as being violative of the equal taxation clauses of Secs. 1 and 2 of Art. 8, and the equal right clause of Sec. 3 of Art. 1 of the Texas Constitution; and of the equal protection and the due process clauses of both the State and the Federal Constitutions; because there is no difference between the situations or occupations of producers of oil from lands owned by the State University and the producers of oil from lands privately owned, which bear any just or reasonable relation to the object or purpose of the Act. And appellant contends that the Legislature cannot under the guise of an occupation tax on the gross production of oil, validly levy the tax against the

owners of royalty interests in the oil produced within this State, for the reason that, with respect to such royalty ownership, they are neither engaged in an occupation nor doing business as contemplated by Art. 8 of the State Constitution.

We construe the Act to levy the tax against the various interest holders in the oil produced, including the producer and royalty owners other than the University, in proportion to their respective interests; that under this construction of the Act no greater burden is imposed on lessees of the University lands than on other lessees of privately owned lands under similar leases for the production of oil; and that as thus construed the Act is valid and constitutional. We also hold that for the purpose of levying a gross production or occupation tax on oil, the Legislature may validly declare the owners of royalty interests in the oil produced to be engaged in the occupation or business of producing oil.

When construed together Subsections 2 and 6 of Section 2 clearly impose the tax "ratably" against "all interested [fol. 60] parties, including royalty interests," and make the producer primarily liable for the payment of the tax. The language that "the tax herein levied shall be borne ratably by all interested parties, including royalty interests," is clear and means that the tax is levied ratably or in proportion to the interest each party has in the oil produced. The language of Subsection 3 of Section 2, that "the producers and/or purchasers of oil are hereby authorized and required to withhold from any payments due interested parties, the proportionate tax due," is also clear and means that a portion of the tax is due from each interested party. If the tax had been levied against the purchaser only, different language would have been employed by the Legislature. There was no reason for providing that the tax be paid ratably or proportionately by all interested parties, if the Legislature had intended to levy the tax against the producer only. The Act clearly designates the parties against whom the tax is levied, the amount each is to pay, and other incidences of the tax.

The provisions that "the tax levied shall be a liability of the producer" does not mean that the tax is levied only against the producer. This provision must be construed together with the other provisions of the Act which declare that the tax is levied against all interested parties ratably

or in proportion to their respective interests in the oil produced.

Nor is the provision that the tax be paid ratably by all interested parties in any manner affected by the provision for the payment of the tax by the producer or purchaser. The provision for a single payment, either by the producer or purchaser, is solely in the interest of the convenient and effective administration of the taxing act. An analogous question was decided in the case of Byrne v. Fulton Oil Co., 278 Pac. 514, 518, wherein the court say:

[fol. 61] "The method of making the operator and the royalty holder jointly liable for the tax and authorizing the operator to withhold from the proceeds of the royalty interest the amount of any tax paid by him, was intended as a certain and expeditious method of collecting taxes on such property, and preventing the possibility of any of it escaping taxation. It was designed to authorize the collection of the tax at the source of the product, in order to avoid the necessity of seeking out each royalty holder for the purpose of effecting collection."

The legislative intent to levy the tax ratably against all interested parties in the oil produced is also clearly evidenced by the language that "the purchaser of oil shall pay the tax on all oil purchased and deduct tax so paid from payment due producer or interest holder," and "withhold from any payments due interested parties, the proportionate tax due." These provisions do not levy the tax against the purchaser. He is merely made the agent of the State to collect from the producer or other interest holders the total amount of the tax due; and he is authorized to charge their respective accounts with "the proportionate tax due." That is, the purchaser withholds from the producer only as an interest holder and only to the extent of his interest. Likewise the purchaser withholds from other royalty or interest holders the amount of the tax due on their royalty or other interests. The Act, therefore, designates the parties against whom the tax is levied. The amount of the tax due by each is also defined or measured by the extent of interest in the oil produced, or the amount paid because it was produced. This language and these provisions must

be given practical effect and application in the interpretation or construction of the Act; and since the purchaser is given the right in making payments due the producer or other interest holders, to withhold the sum of money equal to "the proportionate tax due," it must be held that the Act imposed the tax on the producers and other interest holders ratably or in proportion to their respective inter- [fol. 62] ests in the oil produced. The language of the Act is plain, unambiguous and susceptible of no other reasonable interpretation or construction.

This construction is not only supported by the clear and unambiguous language of the Act, but is required to save it from the vice of unconstitutionality. It is clear that if the producer is liable for the entire tax on oil produced on University lands and the producer of oil from privately owned lands is liable for the tax on only 7/8 of the oil produced, a greater burden, or an unequal taxation burden will be placed upon the producer of oil from University lands. Since, however, we hold that the practical effect of the Act is to impose the tax on the producer and other interest or royalty holders ratably or in proportion to their respective interests; and since the Act placed the collection of the tax in the hands of the producer to such an extent that he can never be required to pay more than his proportionate part of the tax, we do not need to discuss at length the constitutionality of the Act as against the attacks made by appellant.

Suffice it to say that under our above construction of the Act no greater tax burden has been placed or imposed by it on lessees of University lands than on lessees of privately owned lands being operated for oil under the same or similar lease contracts. The lessee or producer under a lease from the State or University receives seven-eighths of the oil produced, or its value, as consideration for the development of the lease, and the State or University owns or receives a "royalty interest" of one-eighth, or a "sum of money equal to a royalty of one-eighth of the value of the gross production of petroleum." Section 7 (2) General Laws, 1917, Chap. 83, pp. 158, 160. This "royalty" is payable in money, but is secured by a statutory lien on the oil and improvements on the property. The courts (Theisen v. Robison, 117 Tex. 489) interpret the Act of 1917 as conveying to the lessee title to all the oil and gas in place; and

[fol. 63] appellees therefore contend that lessee must pay all the tax imposed by the Act involved in this suit, without any deduction on account of the University's royalty interest. Lessee may not be the producer, and may receive an interest in the oil from the producer. It is also a matter of common knowledge that many leases on privately owned lands provide that the one-eighth "royalty" is to be paid in money received from the sale of the oil produced. Others provide for the delivery of one-eighth of the oil produced as royalty, and in which leases the lessee acquires title to only seven-eighths of the oil, the lessor reserving title to the remaining one-eighth. So, it is manifest that the same distinction which appellees urge with respect to the character of title acquired under a state lease and some private leases can also be made as between private leases. Certainly the same distinction and discrimination would exist in applying the taxing act to operations under private leases having similar royalty provisions to State or University leases. But whatever the character of the lease, or whether a State or a private lease, there is always reserved a royalty interest of one-eighth of the oil or a royalty interest equal to one-eighth of the value of the oil produced, sold or unsold, and manifestly this is the "royalty interest" within the contemplation of the taxing act in suit, and against the owner of which the tax was levied. And manifestly the lessee under a State or University land lease assumes substantially the same obligations, expressed and implied, as are assumed by lessees of privately owned lands which have for their purpose the diligent and proper development of the lands for oil, to the end that the amount of the royalty which may be due either in oil or its equivalent may be as large as possible. It may be further observed here that the distinction urged by appellees has not been looked upon with favor by the courts, but all royalty [fol. 64] interests have been placed upon a level by them. At least that is the present tendency of court decisions. Sheffield v. Hogg, 77 S. W. (2d), 1021; Ehlinger v. Clark, 117 Tex., 557; State v. Armson, 207 N. W., 727, 730.

It is also manifest that the tax is not dependent upon the character of title under which the producer produces the oil. Nor is the tax levied on the oil in place. The tax is levied on the business or occupation of producing the oil. The lessees or producers engaged in producing oil on Uni-

versity lands are engaged in the taxed occupation in the same manner as are those who produce oil from privately owned lands, and it would seem that the source or character of title would have nothing to do with the nature of the occupation or business, and such matters are irrelevant with respect to the purposes of the taxing act. Quaker City Cab Co. v. Pennsylvania, 277 U. S. 389, 400; Louisville Gas & Electric Co. v. Coleman, 277 U. S. 32, 37; Southern Railway Co. v. Greene, 216 U. S. 400, 417.

Nor does the fact that the State or University is not liable for the tax levied against the royalty interest enlarge or change the tax liability of the lessee or producer of oil on University lands. This is because, as herein above pointed out, the levy of the tax is made against or limited to the interest of the lessee or producer. The taxing act clearly provided that the royalty interest would be taxed against the owner or holder of the royalty interest. And the fact that the royalty interest belongs to the University, and the fact that the tax cannot be levied against it, does no increase appellant's liability for the tax, but appellant is only required to pay the proportion of the tax levied against it by the taxing act. In the case of Davis v. Wallace, 257 U. S., 478, it is held, as follows:

[fol. 65] "Where an excepting provision in a statute is found unconstitutional, courts very generally hold that this does not work an enlargement of the scope or operation of other provisions with which that provision was enacted and which it was intended to qualify or restrain. The reasoning on which the decisions proceed is illustrated in State ex rel McNeal v. Dombaugh, 20 Ohio St., 167, 174. In dealing with a contention that a statute containing an unconstitutional proviso should be construed as if the remainder stood alone, the court there said: 'This would be to mutilate the section and garble its meaning. The legislative intention must not be confounded with their power to carry that intention into effect. To refuse to give force and vitality to a provision of law is one thing, and to refuse to read it is a very different thing. It is by a mere figure of speech that we say an unconstitutional provision of a statute is "stricken out." For all the purposes of construction it is to be regarded as part of the act. The meaning of the legislature must be gathered from all they have said, as

well from that which is ineffectual for want of power, as from that which is authorized by law.' ''

The Act merely levied the tax against royalty and other interests ratably, and we do not regard the tax as having been levied against the State or University royalty interest, because the Legislature will be presumed to know that the tax could not be lawfully levied against the State or University. Since, however, appellant's tax liability was limited to its interest in the oil produced, and since by subtracting the tax on the royalty interest of the University, because the tax on such interest if levied by the Act was void, appellant's liability was not increased nor enlarged because the attempt to tax the University's royalty interest was void. See also Tex-Louisiana Power Co. v. Farmersville, 67 S. W. (2d), 235.

We are also clear in the view that for the purpose of levying the gross production tax on the occupation or business of producing oil, the Legislature may validly declare the owners of royalty or other interests in the oil produced to be engaged in the occupation or business of producing oil. The ordinary form of oil lease has a dual character or purpose: 1) the conveyance of an estate in the land for development purposes; and 2) the future development and operation of the lease for oil in accordance with the terms, [fol. 66] express and implied, of the contract for the mutual benefit of the parties, their respective benefit being measured by the extent of their interests in the oil produced, or its value. The law is settled that the primary objective or purpose of the oil lease is the production of oil for the mutual profit of the parties. The consideration moving to the lessor is an interest in the oil or its value in money. Thus he has a direct interest in the success of the business. As the holder of the royalty interest the lessor or royalty owner is not only entitled to share in the gross production of the oil, but may under the terms of the lease, expressed or implied, require proper, prudent and diligent management and development of the business, and has reserved and is entitled to both legal and equitable remedies necessary to enforce the obligations of the lease, and under some circumstances may forfeit the lease for non-development. Texas Co. v. Davis, 113 Tex. 321; Robinson v. Jacobs, 113

Tex., 231; Thomason v. Ham, 113 Tex., 239; Munsey v. Marnett Oil & Gas Co., 113 Tex. 212.

The tax of 2¢ per barrel on oil produced is a gross production or gross receipts tax, the amount of the tax being measured by the gross activity of the business, and is under the authorities an occupation tax. G. H. & S. A. Ry. v. Davison, 93 S. W. 436; G. H. & S. A. Ry. Co. v. State, 210 U. S. 217; Producers Oil Co. v. Stephens, 99 S. W. 157; Kansas City Life Ins. Co. v. Love, 101 Tex., 531. And since the taxing act in suit contemplated a tax on gross production of oil, the amount of the levy being measured or determined by the gross receipts of the oil or business, we conclude that the Legislature may reasonably impose the tax burden on those entitled to share in the gross receipts or profits of the oil enterprise, particularly so since under the lease contracts royalty owners may enforce its express and implied covenants, looking to the proper and diligent development and [fol. 67] management of the business, to the end that their share in the receipts will increase and produce a greater royalty interest in the business.

In accordance with our above conclusions, we affirm the judgment of the trial court as to the item of $242.27, paid as the gross production or occupation tax due on the royalty interest of appellant from privately owned lands; but the judgment otherwise dismissing the suit is reversed and the cause remanded for trial of the facts alleged in the petition.

M. B. Blair, Associate Justice.

Affirmed in Part and in Part Reversed and Remanded.
Filed Nov. 27, 1935.

[File endorsement omitted.]

[fol. 68] IN COURT OF CIVIL APPEALS OF TEXAS

No. 8321

TRUSTEES OF MRS. M. M. (W. I.) COOK EST., Appellants,

vs.

GEO. H. SHEPPARD, as Comptroller of the State of Texas, et al., Appellees

Appeal from District Court, Travis County

OPINION—Filed Nov. 13, 1935

This case is companion to and in most respects is controlled by our decision in the case of Group No. 1 Oil Corporation v. Sheppard, Comptroller et al., — S. W. (2d), —, this day decided. Appellants herein sued George H. Sheppard, State Comptroller, and Charley Lockhart, State Treasurer, for the refund of certain gross production taxes on oil, which they paid under written protest to appellees, aggregating $907.22. The taxes were demanded and collected as being due under H. B. 154, the material portions of which were quoted in the opinion in the companion case; and as being the gross production or occupation tax levied against the one-eighth royalty interests of appellants under their oil leases covering the Cook Ranch in Shackelford County. The leases are the usual form of oil leases, and provide that lessee shall "deliver to the credit of the lessor, free of cost in the pipeline to which it may connect its wells, the equal one-eighth part of all oil produced and saved from the leased premises."

We construe the taxing act in the companion case to levy the tax against the various interest holders in the oil produced or its value, including the producer and royalty owners other than the State University, ratably or in proportion to their respective interests. This construction of the act in the companion case disposes of most of the constitutional defenses interposed by appellants in this case, and [fol. 69] only one additional constitutional question will be discussed.

Appellants contend that the taxing act in suit is violative of the obligation of contract clauses of both the State

and Federal Constitutions, for the reasons: 1) that it impairs the antecedent obligations of appellants' lessee to deliver them the equal one-eighth part of the oil produced, free of costs, the taxing act in force at the time of the execution of the contract having required the lessee to pay the entire gross production tax on the oil; and 2) that the present taxing act requires the producer with whom appellants had a contract prior to the enactment of such taxing act to pay them the regular posted price for the royalty oil, to deduct from the royalty interests due the proportionate amount of the gross production tax, and remit the same to the State officials named. Manifestly this taxing act does not change in any manner the lease contracts between the parties. The tax is not against the oil royalty. It is levied as a gross production tax on the business or occupation of producing oil. The tax belongs to the State, and the mere fact that the producer is primarily liable for the payment of the tax, or the fact that the purchaser is required to collect the tax for the State at its source or origin, does not give them any interest in the tax against the royalty interests. They may have benefited by the change of legislative policy of imposing the tax ratably against the respective interest holders in the oil produced; but such legislative tax policy did not impair any obligation of the lease contracts.

In this connection appellants cite several cases in support of the contention that royalty owners under the [fols. 70 & 71] ordinary form of oil and gas leases are not engaged in the business of producing oil. None of these cases is in point. The dicta in the case of Flynn v. State Tax Com., 28 Pac.-(2), 889, is to the contrary. It reads:

"Our minds do not reject the idea that the lessee and the royalty owner, considered as participating in a joint enterprise, are both engaged in the business of producing or severing oil, and that the tax is therefore essentially occupational. Such a view, however, is not indispensable to sustaining the tax. For it may be considered occupational as to the lessee, and another kind of tax to the royalty owner. Unless found as to one or the other, to be a tax upon tangible property it need not be levied ad valorem, and is an excise."

The point involved was left undecided in Byrne v. Fulton Oil Co., 78 Pac. 514, because the statute construed did

not impose the tax on the royalty interest. This case does hold, however, that the levy of a tax on the royalty interest in lieu of a property tax, the tax to be paid by the producer with right to deduct the amount of the tax paid in making settlement with the royalty owner, did not impair the obligation of the lease contract. See also Lake Superior Consolidated Iron Mines v. Lord, 271 U. S. 577. Our view that the Legislature may validly declare the owners of royalty interests in the oil produced to be engaged in the business or occupation of producing oil for the purpose of levying the occupation tax against them is fully expressed in the companion case, with citation of authorities which we construe as sustaining that view. That view need not be reiterated here.

We find no error in the judgment of the trial court holding the tax act to be constitutional and dismissing appellants' suit for a refund of the taxes paid, and it will be affirmed.

M. B. Blair, Associate Justice.

Affirmed.

Filed Nov. 13, 1935.

[File endorsement omitted.]

[fol. 72] In Court of Civil Appeals of Texas

[Title omitted]

Petition for Appeal—Filed March 7, 1936

To said Honorable Court:

The appellants, George Thompson, Jr., and J. H. Barwise, Trustees of the Estate of Mrs. M. M. (W. I.) Cook, deceased, in the above cause respectfully represent:

1. November 13, 1935, this Court affirmed the judgment of the District Court of Travis County, Texas, dismissing plaintiffs' cause, holding in that connection that the Act of the Texas Legislature known as House Bill 154, Acts 1933, did not contravene the due process clause of the Fourteenth Amendment to, and the obligation of contract clause of the Federal Constitution, as claimed by appellants.

2. Appellants duly applied to the Supreme Court of Texas urging reversal of the judgment of this Court and reiterating their claim that said law contravenes said clauses of the Federal Constitution. The Supreme Court refused the petition for writ of error February 5, 1936, and overruled our motion for rehearing February 26, 1936, and has returned the record in the cause to this court which is [fol. 73] therefore the highest court of the State in which a decision may be had.

3. Appellants desire to appeal from the judgment of this Court to the Supreme Court of The United States, and present herewith the requisite Assignment of Errors, Statement as to Jurisdiction, and security for costs on their said appeal.

Wherefore, appellants pray that upon consideration hereof an order be entered allowing them an Appeal herein to the Supreme Court of the United States.

William R. Watkins, Attorney for Appellants.

[File endorsement omitted.]

[fol. 74] In Court of Civil Appeals of Texas

[Title omitted]

Assignment of Errors—Filed March 7, 1936

The appellants assign the following errors in the proceedings and decree of the Court of Civil Appeals, which they will urge upon their appeal to the Supreme Court of the United States:

I

The Court of Civil Appeals erred in holding the Legislature and appellees could, consistently with the due process clause of the Federal Constitution, arbitrarily provide and say in and under the law in question that appellants are engaged in the business of producing oil, when they are not in fact so engaged, in order to lay upon them a tax for which they could not be held liable unless they were so engaged.

II.

Appellants antecedent leases having obligated the lessee to deliver appellants' royalty oil to their credit in the pipeline free of cost, the Court of Civil Appeals erred in holding [fol. 75] that the obligation of said leases was not impaired in violation of the obligation of contract and due process clauses of the Federal Constitution, by the tax law in question, which authorizes and requires the deduction of two percent of the proceeds of appellants' oil and the addition of a like amount to the proceeds of lessee's oil, which relieves the lessee of a part of the cost of producing the oil, makes the appellants' royalty interest less valuable, and the method of enforcing the lease entirely different than when it was made.

III

The Court of Civil Appeals erred in holding that the provision of the law in question which requires the purchaser of the oil to withhold two percent of the contract price thereof, does not impair the obligation of said sales contract in violation of the obligation of contract clause of the Federal Constitution.

IV

The Court of Civil Appeals erred in holding the law in question does not contravene the provisions of the Federal Constitution mentioned in plaintiffs' petition.

V

The Court of Civil Appeals erred in holding appellants were not entitled to recover the taxes exacted, and to enjoin the future taxes assessed under the law in question.

Wherefore, premises considered, appellants pray that upon consideration of their appeal the decree of the Court of Civil Appeals be reversed.

William R. Watkins, Attorney for the Appellants.

[File endorsement omitted.]

[fols. 76-82] In Court of Civil Appeals for the Third Supreme Judicial District of Texas, at Austin

No. 8321

Mrs. M. M. (W. I.) Cook Estate, Trustees, Appellants,

vs.

George H. Sheppard, As Comptroller of the State of Texas, and Charley Lockhart, As State Treasurer of Texas

Order Allowing Appeal—Filed March 7, 1936

On this the 7 day of March, 1936, upon consideration of the appellants' petition for the allowance of an appeal to the Supreme Court of the United States from the final judgment against them herein, the Appellants' assignment of errors and jurisdictional statement, filed as required by Rule 12 of the Supreme Court of the United States, accompanying and being considered in connection with the same; and it appearing that a writ of error has been refused by our Supreme Court herein and the record in the cause returned to this Court where by law it remains,

It is ordered, by the undersigned Chief Justice of the Court of Civil Appeals for the Third Supreme Judicial District that said petition for appeal be, and the same is hereby allowed, upon filing and approval of security for costs in the sum of $500.00.

Jas W McClendon, Chief Justice, Court of Civil Appeals for the Third Supreme Judicial District of Texas.

[File endorsement omitted.]

[fol. 83] Supreme Court of the United States

Appellants' Statement of Points to Be Urged and of Parts of the Record to Be Printed—Filed March 12, 1936

Pursuant to the provisions of Paragraph 9, Rule 13 of the Court, the appellants make the following statement of the points on which they intend to rely, to-wit:

1. It being an admitted fact that appellants are not engaged in the business of producing oil, the Texas Gross Production Tax law of 1933, as Amended, which arbitrarily provides that they are engaged in such business, to lay an otherwise prohibited tax upon them, contravenes the due process clause of the Fourteenth Amendment to the Federal Constitution.

2. Appellants antecedent lease having obligated the lessee to deliver appellants' royalty oil to their credit in the pipe line free of cost, the tax law in question which authorizes and requires the deduction of two per cent of the proceeds of appellants' oil and the addition of a like amount to the proceeds of their lessee's oil, which relieves the lessee of a part of the cost of producing the oil, makes the appellants' royalty interest less valuable, and the method of enforcing the lease entirely different than when it was made, violates the due process clause of the Fourteenth Amendment to, and the obligation of contract clause of the Federal Constitution.

[fol. 84] 3. The law in question violates the obligation of contract clause of the Federal Constitution in requiring the purchaser of their oil who is obligated under an antecedent contract to pay its posted price therefor, to pay only 98% of such price and give their lessee the benefit of the 2% deduction.

Appellants deem the following parts of the record necessary for consideration of the points to be urged and request that same be printed:

1. Petition,
2. Answer,
3. Agreed Statement of Facts,
4. Judgment District Court,
5. Assignments of Error in Court of Civil Appeals,
6. Judgment Court of Civil Appeals,
7. Assignments of Error, Motion for Rehearing C. C. A.,
8. Order Overruling Motion for rehearing,
9. Assignments of Error in Supreme Court on Writ of Error,
10. Order Supreme Court denying Writ of Error,
11. Motion for rehearing Supreme Court,

12. Order Overruling Motion for Rehearing Supreme Court,
13. Opinions Court of Civil Appeals in Group No. 1 Oil Corporation v. Sheppard and in this case,
14. Petition for Appeal,
15. Assignment of Errors,
16. Order Allowing Appeal,
17. This Designation.

William R. Watkins, Attorney for the Appellants.

The appellees acknowledge service of the foregoing designation by the appellants of the points they intend to rely upon and of the parts of the record to be printed. The appellees waive the right to file a further designation as authorized by Rule 13, Paragrah 9.

This the 7 day of March, 1936.

Hubert T. Faulk, Assistant Attorney General for the Appellees.

[fol. 85] [File endorsement omitted.]

Endorsed on cover: File No. 40,378. Texas Court of Civil Appeals, Third Supreme Judicial District. Term No. 824. Joseph H. Barwise and George Thompson, Jr., as Trustees of the Estate of Mrs. M. M. (W. I.) Cook, Deceased, Appellants, vs. George H. Sheppard, as Comptroller of the State of Texas, et al. Filed March 12, 1936. Term No. 824, O. T., 1935.